IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 15

E. BOTELER, Trustee of the Estate of Richmaid Creameries, Inc., a corporation, Debtor,

Petitioner,

vs.

RAY INGELS, Director of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California, and the MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA,

Respondents.

No. 16

L. BOTELER, Trustee of RICHMAID CREAMERIES, INC., a corporation, Debtor,

Petitioner,

vs.

RAY INGELS, Director of Motor Vehicles of the State of California, and HOWARD E. DEEMS, as Registrar of Motor Vehicles of the State of California,

Respondents.

RESPONDENTS' BRIEF IN ANSWER TO PETITIONER'S OPENING BRIEF

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STATEMENT OF THE CASE

We deem it appropriate, for a full understanding of the facts and the issues of law herein involved, to supplement Petitioner's Statement of the Case as follows:

The original petition filed by Richmaid Creameries, Inc., was filed on September 16, 1936. The applicable statute was section 77 (b) of the Bankruptcy Act (Title II, USCA, Section 207; Chapter 424, 48 Stats. 912, as amended by Chapter 577, 49 Stats. 664 and Chapter 809, 49 Stats. 965).

Later amendments to this section were made by Chapter 589, 50 Stats. 622.

The present law is to be found in Chapter 10, Title II, USCA, sections 501 to 676.

For convenience we will refer to section 77 (b) as the same appears in section 207 of the code (Title II, p. 1057).

Following the filing of the petition a temporary trustee (Chamness) was appointed as authorized in section 207 (c).

No plan of reorganization having been approved, on December 22, 1936, the court made an order directing liquidation of the assets and trustee Chamness was appointed temporary trustee, and the matter was referred to the referee in bankruptcy for further administration pursuant to the applicable provisions of section 207. The temporary trustee (Chamness) was authorized to continue operation of the business and did operate it until January 20, 1937, when petitioner (Boteler) was appointed trustee for purposes of liquidation, and thereafter petitioner continued to operate the business down to February 28, 1937.

The fees for registration and licenses on the twenty-seven motor cars and trucks used in the operation of the business due January 1, 1937, and payable without penalties up to February 4, 1937, amounted to $410.90 but were not paid by either of the trustees. The fees not having been paid by February 4, 1937, the penalties prescribed by the California statutes became due and payable and constituted a lien on the vehicles. (Petitioner contends he did not have the funds with which to pay the taxes prior to February 4, 1937, or with which to pay the combined taxes and penalties after that date but the circuit court of appeals held otherwise.)

On February 27, 1937, the trustee applied to the Department of Motor Vehicles for the 1937 license plates on the twenty-seven vehicles and tendered the fees but not the penalties. The department refused to issue the plates except upon payment of the fees and penalties. Thereafter the trustee obtained from the referee an order requiring respondents to show cause why *the penalties should not be set aside;* why the license plates should not be issued on the *payment of the fees without penalties;* why respondents *should not be required to file claims,* or be barred from so doing, and why the trustee should not be authorized to sell the motor vehicles *free and clear of any liens* claimed by the department.

The Attorney General of California, appearing for respondents, objected to the jurisdiction of the referee to hear and determine the matters set forth in the order to show cause. The objection was overruled and evidence was taken and the matter submitted upon briefs, the Attorney General renewing his objection to the jurisdiction of the referee. Thereafter an amended petition was filed by the trustee seeking an order requiring respondents to show cause why they should not "forthwith file such claims as they assert against this estate * * *" and why the trustee should not be authorized to sell said vehicles free and clear of any and all liens "upon the payment of registration and license fees without the penalties."

A hearing was had, upon the evidence previously submitted.

The evidence before the referee showed that from September 16, 1936, to January 19, 1937, inclusive, said John H. Chamness, as trustee, received $70,006.23 in connection with his operation of the business of said debtor as aforesaid, of which receipts $10,169.86 were obtained between January 1, 1937, when the license fees in question accrued, and January 19, 1937, inclusive (R. I, p. 79). Nevertheless, the operations by said trustee resulted in a deficit (R. I, p. 80). From January 20, 1937, when the liquidating trustee took over the property and business, to and including February 4, 1937, when said fees became delinquent, said

liquidating trustee received a total of $7,899.61 from his operation of said business and from the cash on hand at the time he took charge of the business (R. I, p. ~~91~~ 59). During the same period he made disbursements in connection with the operation of said business in the total amount of $7,624.46 (R. I, pp. ~~92-98~~ 60-64).

Despite this evidence the referee found that "the trustee herein had absolutely no funds in his possession between the date of his appointment on the 20th day of January, 1937, and the 27th day of February, 1937, with which to purchase the 1937 license plates for said motor vehicles" (R. I., p. ~~40~~ 24, par. V), and that "at no time prior to the 27th day of February, did said trustee have funds with which to pay said registration and license fees owing upon said motor vehicles and that the same condition existed from the date that the order of liquidation was made herein, to wit, the 22d day of December, 1936, to the date of the appointment of L. Boteler, the present trustee on the 20th day of January, 1937" (R. I, p. ~~41~~ 25).

Pursuant to his findings of fact and conclusions of law, the referee, on June 14, 1937, made and entered his order that any and all penalties assessed upon or claimed against the aforesaid motor vehicles operated by said trustees in connection with their conduct of the business of said debtor bankrupt should be and were thereby set aside, and ordered and directed said trustee to sell said motor vehicles

free and clear of any and all claims and liens of said Ray Ingels, Director of Motor Vehicles of the State of California, and of said Howard E. Deems, Registrar of Motor Vehicles of the State of California, and of said Motor Vehicle Department of the State of California, and further ordered, adjudged and decreed that said parties, and each of them, be and they were thereby ordered to file herein their claim or claims for the registration and license fees owing upon said motor vehicles and against the above named bankrupt estate on or before thirty days from the date of said order or be forever barred from asserting any claim or claims for taxes and/or registration or license fees against said motor vehicles and against said bankrupt estate or the trustee therein, either in his official capacity as said trustee or individually. Said referee declined, however, to make any order directing said department or said officers to receive the principal of said fees in full payment of all sums owing said department on said vehicles, and declined to enjoin said department or said officers from demanding the penalties prescribed by law as a condition to the registration or transfer of said vehicles in the State of California in 1937, but ordered, adjudged and decreed that said order be without prejudice to the right of the trustee to apply to the federal court for any injunctive relief which said trustee might deem appropriate under

the provisions of the Bankruptcy Act and subdivision 3 of General Order XII (R. I, pp. ~~43-44~~). 26-27

Petition for review of said order of the referee was duly and regularly filed (R. I, pp. ~~45-56~~), and, 27-35 on October 22, 1937, the district judge in the court below made his order denying said petition for review and confirming the findings and order of the referee (R. I, p. ~~61~~). 38-39

In the meantime said L. Boteler, trustee, had filed with said district court his petition for mandatory injunction directing said Ray Ingels as Director of Motor Vehicles of the State of California, and Howard E. Deems, as Registrar of Motor Vehicles of said state, to issue the license plates and certificates required for the operation of the vehicles of the debtor-bankrupt upon the public highways of the State of California, upon the payment of the principal of the fees required by law for such plates and certificates, and without the payment of the penalties required by law to be added thereto for delinquency (R. II, pp. ~~9-15~~). 5-6 Said district court issued its order to show cause pursuant to said petition (R. II, pp. ~~15-17~~). 9-10 At the time fixed in said order to show cause, said state officers named as respondents therein filed their motion to dismiss the petition for mandatory injunction upon the ground that the petition did not state sufficient facts to authorize the granting of any relief and upon the further ground that said court did not, in said bankruptcy proceeding, have summary

jurisdiction over the State of California or any of its officers to grant the relief prayed for in said petition or any relief (R. II, pp. ~~17-19~~ 10-11). Said motion to dismiss was denied, whereupon said respondents filed their answer to said petition for mandatory injunction, admitting certain allegations and denying others, and, as a separate and affirmative defense, again raising the question of the summary jurisdiction of said court (R. II, pp. ~~19-22~~). 11-13

Evidence both oral and documentary was thereupon offered and received at said hearing upon said petition for mandatory injunction. Said evidence was the same as that set forth hereinabove, which was offered and received in the proceeding before the referee in bankruptcy herein, upon which the referee's aforesaid order of June 14, 1937, was made (R. II, p. ~~22~~ 14). The matter was duly submitted to said district court and said court thereafter, on or about January 3, 1938, made its findings of fact and conclusions of law, which in effect found to be true all of the allegations of said petition for mandatory injunction (R. II, pp. ~~22-26~~ 14-17), and particularly found that neither the temporary trustee, who operated the business of said debtor from September 16, 1936, to January 20, 1937, as hereinabove set forth, nor the permanent and liquidating trustee, who operated said business thereafter and until February 27, 1937, "had sufficient funds with which to purchase the 1937 license plates"

upon the motor vehicles used by said trustees in connection with such operation of said business (R. II, p. ~~24~~ 25, par. IV).

Accordingly, on said third day of January, 1938, said district court made and entered its decree, ordering and enjoining said respondent state officers to issue to said petitioner as trustee in bankruptcy, certificates of ownership and registration cards and license plates upon the motor vehicles in question upon the payment to the Motor Vehicle Department of said state of the registration fee and vehicle license fee for the year 1937 without the penalties provided by the Vehicle Code of the State of California, and the Vehicle License Fee Act of the State of California for delinquency (R. II, pp. ~~28-31~~ 18-19).

From these orders appeals were taken to the Circuit Court of Appeals for the Ninth Circuit, resulting in a reversal of said orders (100 Fed. 2d 915).

The consolidated cases were then brought to this court upon writ of certiorari granted on April 24, 1939.

SPECIFICATIONS OF ERROR

Petitioner relies upon the following specifications of error:

"1. In holding that section 57j of the Bankruptcy Act is not applicable to penalties which accrue during the course of the administration

of a bankrupt estate, while the estate is being operated incidental to its liquidation.

2. In holding that the State of California has a lien on the property of the bankrupt estate, which lien accrued during the course of administration of the bankrupty estate.

3. In holding that the Act of June 18, 1934, (48 Stat. 993, 28 U. S. C. A., Sec. 124(a)), subjects the Trustee in Bankruptcy to liability for penalties attached to state taxes.

4. In holding that both the District Court and the Referee in Bankruptcy erred in finding that the Trustee had no funds with which to pay the motor vehicle taxes."

We are unable to find where petitioner has made any reference either in his "Summary of Argument," page 7, or in the "Argument" itself, page 8, to the second specification of error.

It appears that Paragraphs (1) and (2) of the Summary relate to the first specification of error; Paragraphs (3) and (4) of the Summary relate to the third specification of error, and Paragraph 5 of the Summary relates to the fourth specification of error.

In view of the foregoing we are somewhat in doubt as to the proper method of replying to petitioner's argument. However, notwithstanding the fact that petitioner has apparently abandoned his second specification of error, this court may be interested in the same and we have concluded that the best course to pursue is to deal with each specification of error in turn.

RESPONDENTS' ARGUMENT

I

Section 57j of the Bankruptcy Act Is Not Applicable to Claims, Not Provable in Bankruptcy, Arising Out of the Operation of a Business by a Trustee in Bankruptcy

It is respondents' position that the circuit court of appeals was correct in its decision that section 57j of the Bankruptcy Act (Section 93 of the Code) is applicable only to debts or claims provable in bankruptcy, and that it is not applicable to expenses of doing business incurred by a trustee while carrying on the business of the bankrupt in the (presumed) interest of the creditors.

In its opinion the circuit court of appeals said (100 Fed. (2d) 915, 918):

> "Whether a debt or claim is provable in bankruptcy turns upon its status at the time of the filing of the petition (Sec. 760, Remington on Bankruptcy, 4th ed.); claims not owing at the time of filing of the petition are not provable. Sec. 807, *Remington; Colman Co. v. Withoft,* 9 Cir., 195 F. 250, 252; *Cantor* v. *Cherry,* 3 Cir., 73 F. 2d 188, Section 1 (9) of the Bankruptcy Act, 11 U. S. C. A. Sec. 1 (9), includes, in the definition of 'creditor' anyone who owns a demand or claim provable in bankruptcy. While actually neither demand nor claim, taxes are 'provable' in their nature. (Sec. 845, Remington.)

If the taxes in question were due and payable at the time of the filing of the petition, they would be provable, and it follows, under section 57j of the Act, 11 U. S. C. A. Sec. 93 (j), penalties thereon would not be allowable, save to the extent permitted by said section.

But here we are confronted with a different set of facts. These taxes became fixed by reason of the operation of the business by the trustee, after the date of the filing of the petition and after the date of what in effect amounted to an adjudication. It should be obvious that a debt or claim created thereby was not provable, not being in existence at the time of the filing of the petition and, therefore, not dischargeable.

The right of the trustee, under order of the court, to operate the business for a limited period cannot be challenged; but the estate, save as to existing lienholders not consenting—of which there are apparently none here, is liable for the charges incurred, even to the extent of the depletion of the assets of the estate, even to the detriment of labor claimants. The reason is simple: The operation of the business in such situation is for the benefit of the creditors. (Remington, Sec. 2662, 445, 446.)

The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways. It is not considered as a tax on the motor vehicle itself, but for the privilege of using the highways. (Blashfield, Cyc. of Automobile Law, Permanent Edition, Sec. 212, Vol. 1, p. 158.) A license to operate a motor vehicle is granted under the inherent right of

the state or municipality to regulate its use on the public highways or streets. (*Ibid.*, Sec. 211, p. 157.) The only automobiles required to be registered under the California Motor Vehicle Act are vehicles to be used upon the public highway (Cal. Stats. 1927, p. 1424, Sec. 11; *California Standard Finance Corp.* v. *Riverside Finance Co.*, 111 Cal. App. 151, 163, 295 P. 555); if the vehicles were not used, no registration fee would have fallen due under the laws of California. But, in carrying on the business of Richmaid, the motor vehicles were operated upon the public highways of the State of California and thereby the registration and license fees attached. They were not paid, but became delinquent, and on February 5, 1937, the penalties prescribed by law applied. (California Vehicle Code, Sec. 370 *et seq.*, St. 1935, p. 147 *et seq.*, California Vehicle License Fee Act, Sec. 6, as amended.)

The motor vehicles in question could not be operated in 1937 without incurring the license and registration fees. Necessarily, therefore, the fees were an expense of doing business and were chargeable against the estate. The trustee has the duty of seeking out and paying all taxes (Sec. 847, Remington). He knew, or should have known, that a license fee was required before the motor vehicles could be legally operated upon the public highways, although, if the motor vehicles had not been used the fees would not have become payable.

Were the motor vehicles operated by Richmaid itself, or any other person or corporation, there would be no question of liability for the

penalties. Is a trustee operating a business absolved from compliance with law?

The trustee cites Section 57j of the Bankruptcy Act, 11 U. S. C. A. Sec. 93 (j), as authority for holding the penalty inapplicable. That section provides that "Debts owing to * * * a State * * * as a penalty or forfeiture shall not be allowed, except * * *" for pecuniary loss, costs and interest. We have already pointed out that the tax in question could not be a provable dischargeable claim. Obviously, the section refers to debts owing by the bankrupt and not by the trustee.

The normal course of procedure in bankruptcy is liquidation, not continuance of the business of the bankrupt. Where the business of the bankrupt is conducted for a limited period by the trustee, upon order of the court, the purpose is to benefit the creditors. The expenses of operation must be paid out of the estate. That the license and registration fees are legitimate expenses, there can be no question."

Petitioner argues, however, that since section 57j employs the term "debts," whereas in other subdivisions of that section the term "claim" or "claims" is used, the intention of congress was to give the term "debts" a broader meaning than the term "claims" and therefore the term "debts" includes indebtedness other than those that could be proved as "claims" (Brief, page 12). No authorities are cited in support of this contention and it appears to us to be completely lacking in merit. But when we advance with petitioner to his further conclu-

sion that by reason of the foregoing interpretation the term "debts" includes expenses incurred by a trustee in operating a bankrupt's business, we are more than ever convinced that petitioner's logic and reasoning are at fault and that his contention is groundless, unsupported by any authority and contrary to decided cases such as:

Michigan vs. *Michigan Trust Co.*, 286 U. S. 334. In this case this court cited with approval

Coy vs. *Title Guarantee & Trust Co.*, 220 Fed. 90.

In the *Coy* case personal property taxes on property in the hands of a federal receiver, with penalties and interest as provided by state law, were ordered to be paid by the receiver. The court quoted from Cooley on Taxation, as follows:

> " 'A court,' says Cooley on Taxation (3d Ed.) Vol. 2, p. 834, 'having in its charge or under its control a fund or other property upon which taxes are due, will, as the representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process, and before all other claims except judicial costs. Thus upon proper application and suitable proof a receiver will be ordered to satisfy a tax assessed against the property in his hands, and a like direction will be made in other cases where funds are held subject to the authority of the court."

Bright vs. *Arkansas*, 249 Fed. 950. (Franchise tax and penalties thereon held payable by receiver of railroad corporation.)

McFarland vs. *Hurley*, 286 Fed. 365. (Severance taxes with interest and penalties held collectible from federal receivers of oil company.)

State vs. *Hisey*, 84 Fed. 2d 802.

Petitioner may claim that cases of equity receiverships are not in point but the analogy is close. If receivers are liable for taxes and penalties while operating the business of insolvent concerns, there appears to be no sensible argument why a trustee operating a business should not likewise be liable.

Certainly there is nothing in petitioner's argument that suggests a sensible reason for his conclusion that section 57j applies to expenses of carrying on a business the same as to "debts" or "claims" provable in bankruptcy.

The tax claims here in question were not provable in the bankruptcy proceedings; they were never filed as such but were treated and acted upon by the referee the same as if they had been provable claims subject to the provisions of section 57j. As a matter of fact, no liability for the payment of the fees demanded by respondents arose until January 1, 1937. It was not until December 22, 1936, that the court in effect adjudicated the company a bankrupt and ordered the liquidation of its assets. At that date no fees were due the state and no provable claim therefor could be filed. The state's claim arose during the time the business was carried on

by the temporary trustee and petitioner, and was therefore a claim not provable in bankruptcy but allowable as an expense of carrying on the business. Presumably this effort was in the interest of the creditors but the fact that the creditors may not and probably did not profit thereby can not affect the question.

The record herein discloses that the question on the appeal to the circuit court of appeals was actually a question as to the jurisdiction and power of a referee in bankruptcy to order state officials to disregard state laws and to perform acts prohibited by those laws. Strictly speaking the question was not as to the construction of section 57j of the Bankruptcy Act. The state had not filed a claim and there was no occasion to invoke the provisions of that section. It seems to us that the real question was as to the duty of the trustee under section 124 (a) of the code.

However, deeming both sections involved, the circuit court of appeals disposed of the matter by holding that section 57j was not applicable and that under section 124 (a) the trustee should have paid the fees as well as the penalties.

In so deciding we submit that the court did not err and that its decision should be affirmed.

II

The Circuit Court of Appeals Did Not Err in Holding that the State Had a Valid Lien for the Fees and Penalties

It is unequivocally provided by the controlling California statutes that the license fees and registration fees demanded by the State of California constitute a lien upon the vehicles for which registration is sought. Section 379 (a) of the California Vehicle Code provides as follows:

> "Every registration or transfer fee and any penalty added thereto, from the date the same became due, constitute a lien upon the vehicle for which due."

Section 6 of the California Motor Vehicle License Fee Act of 1935, as amended by California Statutes of 1937, Chapter 6, contains an identical provision.

However, despite said provision, said referee made his conclusion of law that said Department of Motor Vehicles does no have a valid lien upon the motor vehicles in question (R. I, p. 42). This was apparently upon the theory that when the property passed into the custody of the court, no further lien could attach to said property (See R. I, pp. 33-35).

It would be just as reasonable to say that no *taxes* can accrue subsequent to bankruptcy, because it is the general rule that *claims* against the estate must be determined as of the date of adjudication. Manifestly, the general rule in regard to the date

as of which the rights of creditors are fixed, has no application whatsoever to taxes accruing subsequent to the adjudication of bankruptcy or to appointment of a receiver.

See

Swarts vs. *Hammer*, 194 U. S. 441, 24 S. Ct. 695, 48 L. Ed. 1060;
Coy vs. *Title Guar. & Tr. Co.*, 220 Fed. 90;
People vs. *Hopkins*, 18 Fed. 2d 731;
Bright vs. *Arkansas*, 249 Fed. 950;
McFarland vs. *Hurley*, 286 Fed. 365;
Michigan vs. *Michigan Trust Company*, 286 U. S. 334, 52 S. Ct. 512;
Board of Commissioners vs. *Bernardin*, 74 Fed. 2d 809; Certiorari denied, 55 S. Ct. 645; *In re Preble Corporation*, 15 Fed. Supp. 775.

Nor is there any reason why the general principle with regard to the continuance of tax liability during bankruptcy or receivership proceedings should not include the liability of the property to tax *liens* as provided by law.

1 *Clark on Receivers* (2d Ed.) 958;
Southern Railway Company vs. *Kentucky*, 284 U. S. 338, 52 S. Ct. 160 (1932), affirming 38 S. W. (2d) 696;
Board of Commissioners vs. *Bernardin*, *supra*;
Union Trust Company vs. *Great Eastern Lumber Company*, 248 Fed. 46, 47;
First National Bank vs. *Ewing*, 103 Fed. 168, 178-179, 188-191; certiorari denied 179 U. S. 686, 21 S. Ct. 919, 45 L. Ed. 386.

And see:

State vs. *Hisey*, 84 Fed. (2d) 802.

Said referee therefore erred in making the conclusion of law that said Department of Motor Vehicles has *no valid lien* upon the motor vehicles in question. Said conclusion is contrary to the law and to the findings of fact of said referee. The state has a lien to secure the principal of the tax, at the very least.

The referee states that in any event the *penalties* can not constitute a lien because the penalties can not be allowed in bankruptcy (R. I, p. 35). No authority is cited in support of this broad proposition. The question of the *allowability* of a claim in bankruptcy, and of the *existence of a lien to secure that claim*, should not be confused. As will be hereinafter more particularly pointed out, it is well settled that there may be a *valid lien* existing in support of an obligation which is *not an allowable claim*, and that if this is the situation, the obligation, as a secured obligation, must be satisfied from the security regardless of whether or not it is a claim which could be allowed as against the general assets of the bankrupt estate. Sec. 57j of the Bankruptcy Act does not relate in any degree to the question of whether or not a lien *exists* to secure the payment of penalties.

The California statutes in question specifically provide that the penalties, as well as the principal of the fees, shall be a lien upon the vehicles for

which registration is required as a condition to their operation upon the public highways of this state (California Vehicle Code, Sec. 379; California Motor Vehicle License Tax Act, Sec. 6). Nor is there any general rule of law which would prevent the lien specified by said statute from accruing merely because the tax debtor is an officer of the court rather than an individual. The same principle under which it is held that *taxes* become liens notwithstanding the property is in the custody of the court, supports the proposition that the penalties which are added to and become a part of said taxes may likewise become liens notwithstanding the property is in the custody of the court.

State vs. *Hisey, supra,* at p. 805;
Appeal of City of Titusville, 108 Pa. St. 600;
Northern Finance Corporation vs. *Byrnes,* 5 Fed. (2d) 11, 12;
Bright vs. *Arkansas,* 249 Fed. 953, 955.

In any event, any possible doubt in this regard is removed by the provisions of 28 U. S. C. A. Sec. 124a. If the trustee is to be liable for taxes applicable to a business conducted by him "the *same* as if such business were conducted by an individual or corporation," then he must be liable for the taxes and penalties as a *secured* obligation, the *same* as an individual or corporation would be.

The referee erred in determining that the state had no lien for either the license fees or the pen-

alties added thereto, and the circuit court of appeals properly reversed his ruling and that of the district court.

III

Section 124 (a), 28 U. S. C. A. Subjects a Trustee in Bankruptcy to Liability for Penalties Attaching to State Taxes

1. Section 57j of the Bankruptcy Act applies only as to penalties owing by the bankrupt: 28 U. S. C. A. section 124a controls as to the tax liability of the trustee

It is submitted that section 57j of the Bankruptcy Act does not apply at all as to tax penalties owing by trustees in bankruptcy, not even to the limited extent to which said section applies, as hereinafter more fully considered, to penalties owing by the bankrupt.

Said section provides as follows:

> "Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be *allowed*, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (11 U. S. C. A. Sec. 93 (j).) (Emphasis added.)

In the first place, entirely aside from any question as to the effect of the act of June 18, 1934 (28 U. S. C. A. section 124a) said section 57j mani-

festly relates solely to the matter of the allowability of claims *against the bankrupt*. Neither said section 57j nor any other provision of the Bankruptcy Act relating to the allowability of claims against the estate has any bearing whatsoever upon the question of the liability of the *trustee* for taxes and penalties accruing by reason of his own conduct of the business of the bankrupt, or for other expenses of administration.

See

In re Green, 231 Fed. 253;
Cantor vs. *Cherry*, 73 Fed. (2d) 188; certiorari denied, 293 U. S. 626, 55 S. Ct. 345, 79 L. Ed. 712;
Cf. *People* vs. *Olvera*, 43 Cal. 492;
Hancock vs. *Whittemore*, 50 Cal. 522;
Miller & Lux Inc. vs. *Katz*, 10 Cal. App. 576.

In any event, whatever may have been the proper application of said section 57j prior to June 18, 1934, it is clear that since that date said section has no application to the liability of a trustee who chooses to conduct the business of the bankrupt. On that date congress enacted a statute which specifically related to the liability of all court officers for excise or license taxes. By that statute a new section was added to the judicial code whereby it is now provided that:

"Any * * * trustee * * * appointed by any United States Court who is authorized by said court to conduct any business, or who does conduct any business, shall * * * be

subject to all State and local taxes applicable to such business *the same as if such business were conducted by an individual or corporation* * * *" (28 U. S. C. A. section 124a.) (Emphasis added.)

This is the section, then, which now determines the tax liability of trustees in bankruptcy for taxes *accruing subsequent to their appointment, on account of their conduct of the bankrupt's business.* It is not only the *later* section, but it *specifically* deals with the *tax liability of trustees who conduct any business.* We must, therefore, determine what *that* section requires.

In the first place, it is to be observed that said section imposes on trustees the same tax liability as would have been borne by the bankrupt had he been operating the business. Manifestly, the tax liability imposed by said section 124a includes not merely the duty to pay the *amount* of taxes which would be owing by the bankrupt, as provided by law, but to pay said taxes at the *time* prescribed by law, and to be subject to the *penalty* imposed by law for failure so to pay said taxes. Any other construction would not in fact impose upon the trustee the same tax burden as would have been imposed on the bankrupt.

In this regard, it must also be remembered that "penalties" are but a part of the "taxes" to which they are added.

State of California vs. *Hisey*, 84 Fed. (2d) 802.

Clearly, then, in making trustees liable for "all state and local taxes" applicable to such business, congress must have intended the trustee to be liable for the *penalties* which are a *part* of said taxes, in the event of failure to pay the tax within the time prescribed by law.

Furthermore, by including in said single section (28 U. S. C. A. Sec. 124a), not only trustees, but receivers, as well, it is manifest that it was the intention of congress to impose upon trustees in bankruptcy who engage in business on behalf of the creditors of a bankrupt, the same tax liability that is imposed upon *receivers* who engage in such business. It is well settled that receivers who fail to pay taxes within the time prescribed by law are subject to the statutory penalties therefor.

Carpenter vs. *Peoples Mutual Life Insurance Company,* 94 Cal. Dec. 674;
State of California vs. *Hisey, supra,* and cases cited therein.

Similarly, then, *trustees* who operate the business of the bankrupt should likewise be required to pay the tax within the time prescribed by law or suffer the penalty imposed therefor by the tax statutes.

It is therefore submitted that section 57j of the Bankruptcy Act was not intended to apply to penalties which accrue against a trustee in bankruptcy by reason of his failure to pay, within the time prescribed by law, taxes owing by himself as trustee. And even if, prior to June 18, 1934, said section *did*

apply to the tax liability of the trustee, such is no longer true. The provisions of section 124a, alone, now control under the circumstances therein specified. Said section imposes on trustees the same tax liability to which the bankrupt would have been subject had he been conducting the business. The bankrupt would have been subject to the duty to pay the taxes *in the amount* specified by the controlling law, *at the time* specified by the controlling law or be subject to the statutory penalty for delinquency. This *same* liability is imposed on trustees who conduct the business of the bankrupt.

2. Even when section 57j is admittedly applicable, it does not relate to the question of liability for penalties or prevent their collection other than as a claim against the general assets in the bankrupt estate

Assuming for the purpose of argument that section 57j of the Bankruptcy Act does apply to penalties owing by a trustee in bankruptcy in the same manner as it applies to penalties owing by the bankrupt, and that it still so applies even as to penalties accruing against a trustee on account of failure to pay taxes owing by him on account of his conducting the business of the bankrupt, it does not follow that said section (1) prevents any penalties being assessed against such trustee, or (2) discharges the liability for any penalties which are so assessed, or (3) prevents their collection, through the bankruptcy court, as a lien upon the property

in the custody of the bankruptcy court, or (4) prevents their collection outside of the bankruptcy forum. For, even as to penalties owing by the bankrupt, to which said section 57j admittedly applies, it i well settled that the provisions of said section do not have such effect.

Said section merely provides that "debts owing to the United States, a state, a county, a district or a municipality as a penalty or forfeiture *shall not be allowed* * *. It does not even purport to relate to the question of the initial accrual of liability for penalties. It does not, for example, say that in certain instances no penalty shall accrue or become a liability. See *Clark* vs. *Barnard,* 108 U. S. 436, where this court refused an injunction to restrain the collection outside of the bankruptcy forum of a penalty owing to a state, which penalty became due after the adjudication in bankruptcy. Section 57j operates solely upon an *accrued* liability for penalties, rather than as a statutory prohibition of the accrual thereof. If, then, said section applies at all as to penalties assessed against the trustee in bankruptcy, it certainly does not apply to any greater extent than it does as to penalties owing by the bankrupt. In neither case does said section relate to the question of the *accrual of liability* for penalties by reason of failure to pay taxes within the time prescribed by law.

Nor does said section even purport to *discharge* any such liability once it has accrued.

Carman vs. *United States*, 21 Fed. Supp. 239, 240.

Therefore, there has been no discharge of the liability for the penalties herein which automatically accrued upon the failure of either of the trustees to pay the required fees within the time provided by law.

Section 57j merely provides a limitation as to the manner in which such obligation can be *enforced* and the accrued liability realized upon. Said section, if applicable, would prevent a claim for the penalties sharing in the general assets in the bankrupt estate. But this is all that said section even purports to do.

In this connection the referee stated "Just how these penalties can be paid unless paid from the 'general assets in the estate' has not been satisfactorily explained" (R. I, p. ~~30~~ 47. It would seem to be elementary that if paid from assets upon which said obligation constitutes a lien, the payment of said obligation is not from the "general assets" in the estate. Likewise, if said obligation can for example, be collected as a condition precedent to the use of said vehicles upon the public highways of this state, it is not a satisfaction from the general assets "in the estate." And the authorities are plentiful in support of these distinctions.

It is well settled that the general provisions of the Bankruptcy Act do not control as to *liens* upon property in the custody of the bankruptcy court. Thus, the mere fact that an obligation is not an *allowable claim* under the Bankruptcy Act does not affect the validity of a statutory *lien* therefor, nor the right of the obligee to the satisfaction of the obligation *as a lien* upon the property in question.

Security Mortgage Co. vs. *Powers,* 278 U. S. 149;
Westmoreland vs. *Dodd,* 2 Fed. (2d) 212, 39 A. L. R. 1279; (certiorari denied, 267 U. S. 595);
Britton vs. *Western Iowa Co.,* 9 Fed. (2d) 488, 45 A. L. R. 711;
Martin vs. *Orgain,* 174 Fed. 772, (certiorari denied, 216 U. S. 619);
Fudickar vs. *Glenn,* 237 Fed. 808;
Courtney vs. *Fidelity Trust Co.,* 219 Fed. 57;
English vs. *Richardson,* 117 Atl. 287, 22 A. L. R. 1302.

Similarly, then, section 57j should not preclude the satisfaction of penalties as a *lien* upon property in the custody of the bankruptcy court.

State of California vs. *Moore,* 88 Fed. (2d) 564.

In that case the court held that the state was not entitled to the payment of its tax penalties as a lien upon the moneys in the hands of the trustee in bankruptcy, *because* the trustee had never had in his possession the property on which the state's

lien existed. Conversely, then, if the trustee *did* have said property in his possession and sold the same free of liens, he would be required to pay said penalties from the proceeds of sale *as a lien* thereon. As is said in the last cited case:

> "(The trustee) had two remedies, one to recover the property—or in damages to recover the value of his interest in the property. Had he recovered the property and sold it the court would decree the lien a prior claim, unless the sale had been subject to the tax * * * If the trustee had sold the property giving full title, the court would on equitable principles recognize the lien on the proceeds of sale and direct payment thereof." (88 Fed. (2d) 564, 566.)

As has been pointed out, it is unequivocally provided by the above mentioned California statutes that the penalties as well as the principal of the fees imposed as a condition to the use of the public highways of this state, constitute a lien upon the vehicles for which registration is sought (Cal. Vehicle Code, Sec. 379; Cal. Motor Vehicle License Fee Act of 1935 as amended by Chapter 6 of Statutes of 1937). It has also been pointed out that these sections apply even though bankruptcy has intervened. Therefore, even if said section 57j applies to the penalties which accrued as against the trustee, said section does *not* preclude the satisfaction of said obligation as a *lien*.

The authorities also fully support the proposition that said section 57j does not preclude the collection

of penalties, *outside the bankruptcy forum,* even if the penalties were against the *bankrupt,* and *are not secured by liens.* In other words, even where said section 57j admittedly applies it is merely intended to preclude the use of the general assets in the bankrupt estate for the satisfaction of penal obligations.

Munz vs. *Harnett,* 6 Fed. Supp. 158;
People vs. *Sheriff of Kings Co.,* 206 Fed. 566;
In re Koronsky, 170 Fed. 719;
Spalding vs. *State of New York,* 45 U. S. (4 Howard) 21.

These cases afford adequate examples wherein it has been held that the bankruptcy court has no power to interfere with the enforcement of state laws merely because such enforcement may *collaterally* have the effect of compelling payment on account of obligations upon which payment can not be compelled *directly in the bankruptcy proceedings.* In this regard, see also *Clark* vs. *Barnhard, supra.*

Section 140 of the California Vehicle Code provides as follows:

"It is a misdemeanor for any person to drive or move, or for an owner knowingly to permit to be driven or moved, upon any highway any vehicle of a type required to be registered hereunder *which is not registered or for which the appropriate fee has not been paid as required hereunder,* subject to such exceptions as are stated in this code.

"This section does not apply:

(a) To the moving or operating of a vehicle not previously registered from a dealer's, distributor's, or manufacturer's place of business to a place where essential parts of the vehicle are to be altered or supplied.

(b) To the transportation of a vehicle upon a highway when no part of such vehicle is in contact with the highway.

(c) To the moving of a vehicle from a place of storage to another place of storage.

(d) To the moving of a vehicle which has been disabled as the result of an accident, for the purpose of repairs.

(e) To the moving or operating of a vehicle for the purpose of dismantling or wrecking the same and permanently removing it from the highways.

No vehicle shall be operated under the provisions of paragraphs (a), (c), (d) or (e) except under a special permit issued by the department."

It is not contended by the trustee that the vehicles here in question came within any of the exemptions to said code. Clearly, then, unless each such vehicle is registered, *and* the appropriate fee is paid therefor, as required by said code, the vehicle can not lawfully be operated upon the public highways. However, the mere fact that the California statutes thus provide remedies which may collaterally have the effect of compelling the payment of penalties imposed for delinquency in the payment of fees required by law as compensation for the use

of the public highways of this state, does not in and of itself justify either the referee or the district court in enjoining the enforcement of said laws or in setting aside said penalties. If the trustee or any other person wishes to operate said vehicles upon the public highways they can do so only if the vehicles are registered and the required fees paid. This is the unequivocal provision of the controlling state law, and neither the referee nor the district court has any jurisdiction to disregard that law.

Nevertheless, the referee made his order that the penalties assessed under said state laws "be and they are hereby *set aside*." (R. I, p. 43, emphasis added.)

Assuming, for the purpose of argument, that the referee was correct in holding that said section 57j applies at all, it does not appear how this section, or any other statutory provision or rule of law, would justify the order *setting aside* said penalties. Said section 57j does not *discharge* penalties, even when it is admittedly applicable. It does not say that no penalties shall *accrue* subsequent to bankruptcy. It does not prevent the *collection* of penalties, whether secured or unsecured, outside of the bankruptcy forum and by collateral means. It does not prevent the collection, within the bankruptcy forum, of penalties which are a *lien* upon property in the hands of the trustee. It merely provides that debts owing to a state as a penalty

shall not be *allowed.* Certainly this does not even purport to authorize the trustee to *set aside* penalties which have been added to state taxes strictly in accordance with the provisions of the state tax laws.

3. The federal decisions construing 28 U. S. C. A., section 124a do not support the decision of the referee herein

The referee relied upon the case of *In re Messenger's Lunch Rooms, Inc.,* 85 Fed. 2d 1002, as squarely supporting his decision (R. I, p. ~~31~~ 17). There are several reasons why said decision should not be followed herein.

In the first place, it is submitted that said decision is unsound. It assumes that section 57j of the Bankruptcy Act applies as to penalties on taxes accruing *during the bankruptcy proceeding.* As has been pointed out, this is erroneous. Said section 57j applies only to penalties which are obligations of the *bankrupt;* i.e., for which "claims" could otherwise be filed and "allowed" as on any other *debt of the bankrupt.*

Furthermore, said decision assumes that, whatever may have been the effect of section 57j of the Bankruptcy Act as to the liability of trustees for delinquency penalties prior to June 18, 1934, the same rule still applies since the enactment, on that date of section 124a of title 28 of the United States Code. This likewise is erroneous. Even if, prior to the adoption of said section 124a, said section

57j did apply as to penalties owing by trustees, it is apparent that section 57j can no longer control as to penalties which are added to taxes which accrue by reason of the trustee's own conduct of the business of the bankrupt. For, as to taxes which accrue in this manner, it is now specifically provided that the liability of the trustee shall be "the *same* as if such business were conducted by an individual or corporation * * *." A part of this liability is to pay the taxes within the prescribed time or be subject to the prescribed penalty. Certainly, congress did not intend to provide merely that trustees who conduct any business should be subject to taxes in the same *amount* as if such business were conducted by an individual or corporation, but could pay said taxes at any *time* such trustees saw fit, without being subject to the penalty prescribed by the tax statute in order to insure prompt payment. The court in said case and the referee and district court herein have read into section 124a words which are not placed there by congress.

Again, the court in the cited case said that in any event said section 124a specifically relates only to liability for *taxes*, and *not* to liability for *penalties*. This discloses a lack of understanding of the relationship between taxes and penalties. Penalties added to the taxes upon delinquency are but a part of said taxes. (*State* vs. *Hisey, supra.*) Therefore, in providing in said section 124a, that

trustees who conduct any business shall be subject to all "*taxes* applicable to such business the same as if such business were conducted by an individual or corporation * * *," congress manifestly did not intend that the trustee should *not* be liable for the statutory penalties for delinquency, which are but a *part* of the taxes to which they are added.

Finally, the court in said decision overlooked the fact that said section makes the liability of trustees the same as receivers and it is well settled that *receivers* are liable for tax penalties accruing subsequent to their appointment (*State* vs. *Hisey*, *supra*).

Therefore, even aside from any distinguishing facts in said cited case, it should not be followed herein. It is not a well considered opinion. Presumably the foregoing features were not called to the court's attention.

In any event, however, the decision in said case is not controlling herein. The facts here are materially different than the facts in said cited case. Thus, it appears that in said case the tax authorities were seeking to recover *penalties in the bankruptcy proceedings*. Furthermore, they were seeking to recover as on an *unsecured claim* against the general assets in the custody of the court. Therefore, assuming for the purpose of argument that said decision properly holds that, despite the provisions of section 124a, section 57j of the Bankruptcy Act, still controls as to penalties, owing by

a trustee who conducts the business of the bankrupt, said decision would not require the same *result* herein. For, as has been pointed out, even said section 57j does not affect the *existence* of penalties, or the *liability* therefor; nor does said section preclude the *collection* of said penalties other than from the general assets in the custody of the court. It does not appear in said *Messenger's* case that the tax constituted a *lien,* or that the tax authorities were endeavoring to collect said penalties other than from the general assets in the custody of the bankruptcy court. Manifestly, then, the facts are entirely different from those involved herein. Here the tax statutes specifically make the penalties a lien upon the vehicles in question (Vehicle Code, secs. 378, 379; Motor Vehicle License Fee Act of 1935 as amended by Stats. 1937, Ch. 6) and, in any event, the tax authorities herein are not seeking to collect said penalties from the general assets in the custody of the court. The state is content to rely upon its collateral remedy under the provision of the Motor Vehicle Code that no person can operate a motor vehicle upon the public highways unless the fees required by said code have been paid. The state is not seeking the aid of the bankruptcy court, as the tax creditor was in the *Messenger's* case. The fact that the bankruptcy forum has the power to preclude the collection of said penalties through its facilities, as a claim against the general assets in its custody, does not

mean that said forum can reach out and control the action of state officers pursuant to a valid statute, which does not in any way affect the general assets of said estate. The decision in the *Messenger's* case is therefore not controlling under the facts in the principal case.

The referee also makes special note of the fact that in said *Messenger's* case, as here, the trustee was not operating the business with the thought of making a profit, but was doing so merely as a step in the liquidation of the estate (R. I, p. 32). It is not apparent how this feature can affect the liability of the trustee under said section 124a. That section does not justify any such distinction. For that matter, properly speaking, a trustee in bankruptcy never operates a business except for the purpose of liquidating the estate. If the estate is not in his hands for the purpose of liquidation and he is conducting the business for a profit, it should be returned to an equity receiver. Any other use of the offices of the bankruptcy forum is a misuse of the facilities provided by that court. Clearly, congress intended that the liability imposed by said section 124a should apply as against all trustees, including those who are conducting a business merely as an incident to its liquidation.

Finally, it should be noted that the decision relied upon by the referee is squarely opposed to the decision of the Circuit Court of Appeals for the Second Circuit, in *In re Humeston*, 83 Fed.

2d 187, 189 (1936). See also *In re Preble Corporation,* 15 Fed. Supp. 775.

On authority as well as on principle, then, it is manifest that the referee erred in making his order setting aside the penalties which, under the controlling tax law, were properly added to the amount of the tax when the trustees herein failed to pay the tax within the time prescribed by law.

IV

Under 28 U. S. C. A. Section 124a, Lack of Funds With Which to Pay Taxes Within the Time Prescribed by Law Does Not Prevent the Accrual of Penalties for Delinquency, and in Any Event the Evidence Herein Shows that the Trustees Had Sufficient Funds to Pay the Taxes Here in Question, and the Contrary Findings Are Not Supported by Any Evidence

The findings of the district court on this point are Findings IV, VII and VIII (R. II, pp. ~~24-25.~~) 15-16

The tax liability imposed by section 124a upon trustees who conduct any business can not be avoided on the ground that the trustee did not have sufficient cash on hand with which to pay the required licenses at the time specified by law. Liability for taxes is not dependent upon ability to pay the amount required by law. Inability to pay is no bar to the accrual of the penalties specified by law. If, then, the trustee is to be subject to the same tax liability as the bankrupt would have been subject to if *he* had been operating the business,

the same liability must be imposed under the same conditions. That which would constitute no excuse for the bankrupt can not be considered as an excuse when asserted by the trustee who elects to operate the bankrupt's business. There is not the slightest suggestion in said section, or any other statute, that lack of funds would excuse the trustee from the liability which said section so clearly imposes.

The referee and district court, however, were apparently of the view that such lack of funds constituted a defense to the accrual of the penalties prescribed by the tax statutes. Thus, said referee stated, in his opinion, that:

> "The rule announced in the case of the *State of California* v. *Hisey*, holding a receiver responsible where the penalties accrued due to his neglect, does not apply here." (R. I, p. ~~29.~~ 16)

This is manifestly an erroneous interpretation of said case. That case does not limit the liability of a receiver for penalties to instances wherein his failure to pay taxes is due to his neglect. It merely suggests that in the event his failure to pay is caused by his neglect, he may be accountable to the estate for his negligence. In other words, the circuit court of appeals stated:

> "If the receiver had funds in his possession with which to pay the tax and fails to do so, thus incurring a penalty, no doubt he would be responsible to the estate in his custody for the payment of this penalty incurred because of his neglect, *but this liability of the receiver would*

not relieve the property in his custody from the liens imposed by law." (84 Fed. 2d 802, at 805.) (Emphasis added.)

Proceeding upon this erroneous interpretation of said case, however, said referee made a finding that neither of the trustees herein had any funds with which to pay on or before February 4, 1937, the fees in question (R. I, pp. ~~40, 41~~ 24-25, Pars. V and VII). Said district court, upon the separate application pending before it for a mandatory injunction, made similar findings (R. II, pp. ~~24-26~~ 15-16, Pars. IV, V and VIII). It is submitted that said findings are on an immaterial matter, and, even if supported by the evidence, would constitute no defense to the accrual of the penalties in question.

In any event, however, said findings are *not supported* by the evidence, and out of excess of caution the appellants in the lower court (respondents here) assigned as error the making of such findings without there being evidentiary support thereof (R. I, pp. ~~105, 113,~~ 67-70 Par. I; R. II, pp. ~~36, 43,~~ 22-2 Par. IV).

The evidence at the hearing before the district court was the same as the evidence at the hearing before the referee (R. II, p. ~~22~~ 12, Par. XII). The references herein will therefore be solely to the evidence before the referee.

The respondents do not propose to argue to this court the *weight* to be given the evidence. The respondents contend that there is absolutely *no*

evidence, except the conclusions expressed by the trustee himself, to support the findings in question. And such conclusions are squarely opposed to all of the evidence as to the *facts*.

As has been pointed out in the Statement of Facts herein, the trustee who was in charge from September 16, 1936, to January 19, 1937, inclusive, received $70,006.23 in connection with his operation of the business, of which receipts $10,169.86 were obtained between January 1 and January 19, 1937, inclusive (R. I, p. ~~79~~ 51). It is true that the operations by said trustee nevertheless resulted in a deficit (R. I, p. ~~80~~ 52). Yet this affords no answer to the fact that said trustee actually *had and disbursed* the aforesaid funds, while at the same time he was claiming that he did not have sufficient funds with which to pay the license fees owing to the State of California, which accrued on January 1, 1937. The truth is that the trustee apparently was of the opinion that certain other expenses of administration were more urgent than the taxes imposed by the laws of the State of California. However, there is no justification for paying the other operating costs, or any portion of them, and not paying the taxes which lawfully accrue as a result of the operation of the business by the trustee. The taxes in question are fees for the use of the public highways of the State of California. They are, in fact, a condition to the right to use said highways (see *Ingels* vs. *Riley*, 5 Cal. 2d 154). The present trus-

tee and his predecessor deemed it proper for them to exercise the privilege accorded them by the State of California, of using the public highways of said state. It was therefore their duty to pay said fees and thus comply with the laws of the state. As is said in *Gillis* vs. *State of California*, 293 U. S. 62, 66; 55 S. Ct. 4, 5-6:

> "* * * if the receiver can not continue to carry on the Company's business according to the plain direction of Congress, he must pursue some other course permitted by law."

Similarly, the report of L. Boteler, as trustee, shows that from the time he took charge of the business on January 20, 1937, until February 4, 1937, inclusive, when the delinquency penalty accrued, he received a total of $7,899.91 (R. I, p. ~~91~~). 59
This is at the rate of approximately $500 per day. During the same period he made disbursements in connection with the operation of said business in the total amount of $7,624.46 (R. I, pp. ~~92-98~~). By 60-64
permitting the taxes, which were in the amount of $410.90, to become delinquent, penalties in the amount of $348.20 were incurred. Nevertheless, because the trustee considered certain other obligations more pressing, he permitted said fees to become delinquent and said penalties to be added thereto. And yet the referee and the district court found that he did not have sufficient funds with which to pay said fees and that he therefore should not be required to pay the penalties prescribed by

law. Certainly if there is any instance in which a trustee should be held liable for penalties by reason of delinquency in payment of taxes which accrued by reason of his own operation of the business of the bankrupt, this is such a case. Assuming that the ability to pay is *material,* it is difficult to perceive how it can be said that the trustees herein *did not have funds* with which to pay the taxes in question within the time prescribed by law.

For the same reason that *lack of funds* constitutes no defense on the part of the trustee to the payment of the taxes to which the bankrupt would have been subject if his business had been conducted by said bankrupt, any *hardship* which may result to the trustee or the estate by reason of the enforcement of the tax laws is immaterial. Yet this is, in effect, all that the foregoing findings amount to. These findings, even if true, would not afford the trustee any grounds for being relieved from the usual force and effect of the state tax laws. Manifestly, any inability to sell said motor vehicles or inability to liquidate these particular assets of the bankrupt estate or inability to deliver clear title to said motor vehicles could have been and still can be avoided if the trustee had complied or would comply with the terms of the tax laws. Certainly, he should not by reason of his own conduct in failing to pay the fees before they became delinquent, be permitted in effect to *create* the "hardship" of which he complains. Nor should

he be permitted to refuse to pay the penalties prescribed by law on account of such delinquency and then complain of the hardship which results under the terms of the statutes. In other words, even now the trustee can avoid the "hardship" of which he complains by complying with the state laws.

In any event, however, it is apparent that said "findings" are in fact merely conclusions of law and are contrary to the law. The results of the failure to pay the fees and penalties prescribed by the California statutes here in question are that no license plates or registration certificates, and no certificates of ownership can be issued upon such vehicles, and the vehicles can not be operated upon the public highways, until said fees and penalties are paid. (California Vehicle Code, Sec. 140, *supra.*) However, there is absolutely nothing in said statutes which precludes the *sale and transfer* of vehicles without such plates and certificates. The license plates and *registration* certificates are a prerequisite to the right to *use the public highways* of the state. This does not mean that such vehicles can not be used for purposes other than operation upon said public highways. Nor is this a mere academic illustration. Innumerable vehicles are used for construction, agricultural, and like purposes, without being registered. While the certificate of *ownership* affords a certain protection to a purchaser of a motor vehicle, it is not, any more than is a title certificate in the case of real

property, a prerequisite to a transfer of the property in question. That this is true is further borne out by the fact that the district court has recognized in said finding IX (R. II, p. ~~26~~ 46) that the trustee has in fact sold certain of the vehicles in question. Presumably the purchasers would not pay the same price for said vehicles unless they were able to obtain the certificates of ownership and license plates from the State of California which were necessary in order to use said vehicles upon the public highway. As a practical matter, the inability to obtain the license plates and certificates of ownership may affect the *value* of the vehicles in question, but as a legal matter such inability does not *preclude* the transfer of said vehicles nor their use other than upon the public highways of the state. And there is no evidence herein to show that this is not true in the present case.

If the trustee desires to sell said vehicles to persons who wish to use them upon the public highways and who wish the license plates and certificates of ownership, there is no reason why the trustee should not comply with the law the same as any other owner of motor vehicles. The mere fact that compliance with the laws of the state would leave the trustee with less funds for expenses of administration and claims of creditors entitled to share in the general assets in the bankrupt estate, does not support his contention that enforce-

ment of the state laws interferes with the due and orderly liquidation of the bankrupt estate. If it is important that estates in bankruptcy be promptly and efficiently administered, it is equally important that taxes be promptly paid. As this court has had occasion to state

> "Taxes are the lifeblood of government, and their prompt and certain availability an imperious need." (*Bull* v. *United States,* 295 U. S. 247, at 259, 55 Sup. Ct. 695, at 699, 79 L. Ed. 1421 (1935).)

While it is not apparent exactly why the findings here in question were deemed material in any event, the respondents herein, out of an excess of caution, felt it advisable, on account of the error in the legal and factual basis for said findings, to assign the making thereof as error on their appeal to the circuit court of appeals. These findings can not be the grounds for affording the trustee the relief prayed for and granted herein, to which relief he was not in any event entitled.

The decree of the circuit court of appeals, reversing the orders of the referee and the orders of the district court was, we submit, correct in respect to all matters herein complained of by petitioner.

V.

Conclusion

Briefly reviewing the facts and the contentions of the parties herein we respectfully submit:

The trustees conducted the business of the bankrupt and in connection therewith they operated upon the public highways of the State of California the motor vehicles here in question. They thereby became liable for the usual registration and license fees imposed for the privilege of so using said highways. Said fees were not paid by either of said trustees. When they were not paid by February 4, 1937, the penalties prescribed by law were added thereto. There is no provision of law which exempts trustees from the accrual of such penalties. Section 57j of the Bankruptcy Act does not have such effect. It applies solely to penalties accruing as against the bankrupt rather than against the trustee. Section 124a of Title 28 of the United States Code controls as to the tax liability of a trustee who conducts any business. Under said section the trustee is subject to the same tax liability as would have been imposed upon the bankrupt had the latter conducted the business. Upon failure to pay the taxes within the prescribed time, then, the penalties necessarily accrued in the same manner as they would have accrued against the bankrupt.

In any event, even if section 57j of the Bankruptcy Act were applicable, it does not prevent the *accrual* of penalties nor operate to *discharge* any such liability once it has accrued. Nor does it bar the *collection* of penalties except in the particular manner specified in said section, viz, as a claim

against the general assets in the bankruptcy estate. It does not preclude the satisfaction of penalties as a lien upon property in the custody of the court. The penalties here in question are such a lien. This lien must be recognized even under the provisions of the Bankruptcy Act. Furthermore, section 57j does not affect any collateral remedies which may have the effect of compelling payment of the penalties. The statutes here in question preclude the operation of the vehicles upon the public highways unless the fees are paid. Section 57j provides no authority for setting aside this effect of the state tax laws.

In any event, the district court erred in granting relief from said penalties in a summary proceeding. The action is purely a mandamus action against state officers over which the district court probably would not have jurisdiction even in a plenary action, let alone by way of summary proceedings.

The liability of a trustee for taxes arising by reason of his conduct of the business of the bankrupt is not dependent upon his ability to pay the same. In any event, the evidence herein discloses that the trustees did in fact have sufficient funds with which to pay the fees within the time prescribed by law if they had deemed it expedient to do so.

Similarly, the liability of a trustee for such taxes is not dependent upon the question of whether

the enforcement of the tax liability would cause hardship upon said trustees or the bankrupt estate. In any event, the evidence and the law herein clearly shows that such hardship would not result in this case and that if there is any such hardship it is caused by the trustees' own actions.

We believe the decision by the circuit court of appeals was in all respects correct and therefore ask that it be affirmed.

Respectfully submitted.

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